PP

v.

ARUMUGAM NADESON & ORS

HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL TRIAL NO: 45-78-2009]
26 AUGUST 2009

CRIMINAL PROCEDURE: *Bail - Non-bailable offence - Offence of kidnapping - Test applicable for bail - Whether there appeared reasonable grounds for believing accused guilty of offence - Kidnapping Act 1961, s. 3 - Criminal Procedure Code, s. 388*

The seven accused herein made an application for bail pursuant to a kidnapping charge preferred against them under s. 3 of the Kidnapping Act 1961. The issue for determination was whether there appeared reasonable grounds for believing that they were guilty of the non-bailable offence pursuant to s. 388 of the Criminal Procedure Code ('CPC').

Held (dismissing the application):

(1) Based on the contents of the affidavit filed by the prosecution, there appeared reasonable grounds for believing that the seven accused were guilty of the offence. Although the facts stated therein were merely information and not evidence, they nevertheless showed, in no uncertain terms, the specific role and involvement of each of the seven accused in the commission of the offence. Further, the Investigating Officer had affirmed the contents of the affidavit on oath and appropriate weight could be given to it at that stage. On the other hand, the statement by the accused disputing the truth of the affidavit content was merely made by way of an unsworn statement from the Bar. Such statement could not be given any weight. (paras 42 & 45)

(2) The offence of abduction, wrongful confinement or wrongful restraint of a person for ransom under s. 3 of the Kidnapping Act 1961 was a serious offence. Consideration should be given to the possibility of intimidation or tampering of the prosecution witnesses should bail be allowed. (para 46)

(3) It would not be appropriate to order the release of the seven accused on bail taking into consideration the interest of the seven accused, the interest of the victim and his family, society's interest as a whole and the contents of the affidavit by the prosecution. It followed that bail should not be allowed under s. 388 CPC since there appeared reasonable grounds for believing that each of the seven accused were guilty of an offence punishable with death or imprisonment for life. Further, none of the seven accused qualified under the proviso to s. 388 CPC to be released on bail. (paras 46 & 47)

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Loy Chin Hei v. PP [1981] CLJ 177; [1981] CLJ (Rep) 178 HC ***(refd)***
Madjai Sanusi v. PP [2000] 5 CLJ 1 HC ***(refd)***
PP v. Dato' Balwant Singh [2002] 4 CLJ 155 HC ***(refd)***
PP v. Zulkifflee Hassan [1990] 2 CLJ 8; [1990] 1 CLJ (Rep) 249 SC ***(refd)***
Re Mat Shah Safuan, Ex p United Asian Bank Bhd [1990] 1 LNS 115 ***(refd)***
Tai Chai Keh v. PP [1948-1949] Supp MLJ 105 ***(refd)***
Wong Leh Yin v. PP [2007] 8 CLJ 438 HC ***(refd)***
Yusof Mohamed v. PP [1995] 3 MLJ 66 ***(refd)***

Legislation referred to:
Kidnapping Act 1961, s. 3
Criminal Procedure Code, ss. 388(1), 389

For the 1st accused - S Sundarajan; M/s Sundarajan & Assoc
For the 2nd, 3rd, 4th, 5th & 7th accused - Mr Vijian; M/s Vijian Chandran & Partners
For the 6th accused - Mr Selvam; M/s Selvam Shanmugam & Partner
For the prosecution - Isa Hj Hassim DPP

Reported by Usha Thiagarajah

JUDGMENT

Yeoh Wee Siam JC:

[1] Arumugam a/l Nadeson ("the first accused"), Chandran a/l Ragasamy ("the second accused"), Thiagarajan a/l Ganeson ("the third accused"), Thinagaran a/l Kargnat ("the fourth accused"), Magindran a/l Kannan ("the fifth accused"), Prabu a/l Muruti ("the sixth accused") and Parameswaran a/l Ramu ("the seventh accused") (together to be referred to as "the seven accused") were charged as follows (see P2):

Bahawa kamu bersama-sama pada 10 April 2009 jam lebih kurang 8.20 pagi bertempat di hadapan rumah No. 11A, Jalan BU 6/7, Bandar Utama, Damansara di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu, bagi mendapatkan wang tebusan sebanyak RM1,000,000.00 telah menahan Tan Guan Yu (MyKid: 020205-14-0743) dengan cara melarikan dan mengurung secara salah Tan Guan Yu, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 3 Akta Penculikan 1961 (Semakan 1989) dan boleh dihukum di bawah seksyen yang sama dan dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[2] The above offence is a non-bailable offence as provided in the First Schedule to the Criminal Procedure Code ("the CPC") under "Offences Against Laws Other Than The Penal Code" where the "Offence" is "punishable with death, or imprisonment for seven years or upwards".

[3] When the seven accused were first brought to the High Court before me on 18 June 2009, the respective learned counsel for the seven accused made an oral application for bail ("the application") to be granted to each of the seven accused. The court fixed the application to be heard on 10 July 2009. In the meantime, both parties were given their dates for the filing of brief written submissions.

[4] On 10 July 2009 the application came up for hearing before me.

[5] Learned counsel for the first accused opted to adopt the submissions of learned counsel for the second, third, fifth and seventh accused who in turn informed the court that he was adopting the submissions of learned counsel for the sixth accused in support of the application.

[6] The fourth accused could not afford to instruct his counsel for the trial to make the application for bail. He, however, submitted orally to the court that if granted bail, he promises to attend court. He has to support his family, including his mother who is ill. (Note: On the next date, 21 August 2009, learned counsel for the second, third, fifth and seventh accused informed the court he might as well also act for the fourth accused.)

[7] The main provision governing bail for a non-bailable offence is s. 388(1) of the CPC. Section 389 of the CPC then provides for the conditions that may be attached to any bail bond executed under Chapter XXXVIII of the CPC.

[8] Section 388(1) of the CPC provides as follows:

> **388. When person accused of non-bailable offence may be released on bail**
>
> (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence may be released on bail.

[9] Section 389 of the CPC provides as follows:

> **389. Amount of bond**
>
> The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

Submissions Of Applicants

[10] Briefly, the submissions of learned counsel for the sixth accused in support of this application are as follows:

[11] The sixth accused is only 20 years old.

[12] Section 388 of the CPC gives the court the power to release a person who is accused of and arrested for any non-bailable offence.

[13] In *Loy Chin Hei v. Public Prosecutor* [1982] 1 CLJ 177; [1981] CLJ (Rep) 178 Wan Yahya J stated:

A non-bailable offence is no doubt an offence in respect of which the accused may be refused bail, but it is not an absolutely unbailable offence because the court has been given the discretionary power to grant bail in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons.

[14] In *PP v. Dato' Balwant Singh* [2002] 4 CLJ 155 it was held:

(2) The general principle underlying s. 388(1) is that bail may be granted at the discretion of the Court in non-bailable offences. A qualification is made in cases of offences punishable with death or life imprisonment whereby bail shall not be granted if there appear reasonable grounds for believing that the accused is guilty of such offences. Where there are no reasonable grounds, bail may still be granted in such cases at the discretion of the Court. The restriction that has been imposed does not apply to the instances enumerated in the proviso to s. 388(1) with the result that bail may be granted at the discretion of the Court.

[15] Further, in *Dato' Balwant Singh (supra)*, it was also held:

(7) ... The seriousness of the offence cannot be the dominant consideration. The fact that there are no reasonable grounds for believing that the accused is guilty of the offence charged will certainly be in his favour.

[16] Learned counsel submitted that the sixth accused was charged with the other six accused for kidnapping a child named Tan Guan Yu. It is not certain as to who planned the kidnapping, who carried out the kidnapping and whether the 20 year old sixth accused was involved in the offence.

[17] At this point in time, it has yet to be ascertained as to the involvement of the sixth accused in this case since seven persons have been charged for the offence of kidnapping. In view of that, there is therefore not a single reasonable ground to connect the sixth accused to the offence of kidnapping. Based on the above case, bail should be granted by the court according to its discretion.

[18] Learned counsel also referred to *Dato' Balwant Singh (supra)* where the accused was granted bail but with conditions imposed by the court. He informed the court that the parents of the sixth accused were in court and were willing to stand as surety. The sixth accused can report himself to the police station everyday. He should

A not be out of the house but would remain indoors as in condition (iv) in *Dato' Balwant Singh (supra)*. In that case, *Dato' Balwant* had to report to the police once in every two weeks. Bail can be removed if the sixth accused acts contrary to the conditions that may be imposed.

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[19] Learned counsel further submitted that the case of *Dato' Balwant Singh (supra)* is the most appropriate case to be followed here. The principle there differs from *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 where bail was not granted; *Anwar*'s case *(supra)* C was "politically motivated" and it has no legal significance to this case. The principle to be followed in this case is *Dato' Balwant Singh*'s case *(supra)*.

[20] In *Re Mat Shah bin Safuan, Ex p United Asian Bank Bhd* [1990] 1 LNS 115, it was held that the High Court can modify the D conditions of bail. If this court allows bail under s. 388 of the CPC, the conditions of bail can be imposed under s. 389 of the CPC. The parents of the sixth accused would be sureties and would ensure his attendance in court.

E **[21]** In addition, learned counsel for the second, third, fifth and seventh accused had also submitted in his written submissions the following:

[22] The third accused is only 19 years old and lived with his F mother and siblings in Rawang, Selangor. At the time of the raid, the third accused was sleeping in his room. There were several occupants in that house. The police arrested all the occupants including the third accused, a 14 day old baby and a 75 year old woman. If the third accused had not been in that house, he would G not have been arrested. The question is what is the role of the third accused in this case, and whether a 19 year old boy like him can be capable of planning the kidnapping.

[23] As for the fifth accused, he had already moved from Seremban H to Rawang a month before his arrest. At the time when the police made the raid, the wife of the fifth accused and his three year old child were also arrested by the police. The court, however, did not allow the remand of the fifth accused's wife and child.

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[24] The fifth accused was not involved in the planning of the kidnapping. Moreover, during the identification parade, neither the victim nor his mother could identify the fifth accused. There are clearly reasonable elements that the fifth accused was not involved in the kidnapping.

[25] As for the second accused, he was also a tenant at the same premises. The second accused was not identified during the identification parade by the victim and his mother. The truth is that the second accused was not in his house at that time.

[26] The seventh accused had surrendered himself to the police and was not involved either directly or indirectly in the kidnapping.

[27] In *Tai Chai Keh v. Public Prosecutor* [1948-1949] Supp MLJ 105 it was held that where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, the inference most favourable to the accused should be adopted.

Objections Of Learned Deputy Public Prosecutor ("The DPP") To The Application

[28] The DPP's written submissions filed on 10 July 2009 focused on replying the written submissions filed by the sixth accused since at that time the written submissions of the other 6 accused had not been served on him yet.

[29] The DPP cited *Anwar*'s case *(supra)* where Lamin Mohd. Yunus PMR in the Court of Appeal stated:

> To get bail is not as of right. Bail under s. 388 of the Criminal Procedure Code is granted at the complete discretion of the Court.

[30] In the same case, Lamin Mohd. Yunus PMR also clearly stated the various factors to be taken into account in considering bail under s. 388 of the CPC eg, public interest, the country, the accused himself, the prosecution and also the court.

[31] In *Wong Leh Yin v. PP* [2007] 8 CLJ 438, Linton Albert J, *inter alia*, stated:

> It is common ground that the offence is non-bailable and unarguably a very serious one. Hence, the application to admit the applicant to bail pending the requisite consent to prosecute is made under ss. 388 and 389 of the Criminal Procedure Code. The statement

of the law on this is set out in the judgment of Gunn Chit Tuan, J in *Che Su binti Daud v. Public Prosecutor* [1978] 1 LNS 23; [1978] 2 MLJ 162, an authority which has withstood the test of time:

> Though a judge has under sections 388 and 389 of the Criminal Procedure Code (F.M.S. Cap. 6) absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail if there appears *reasonable grounds for believing that the accused has been guilty of an offence punishable with death or life imprisonment* … What constitutes exceptional and special reasons must necessarily depend on the facts of each case … (at page 162). (emphasis added by DPP).

[32] Linton Albert J later went on to state, 'At this early stage the prosecution is neither expected nor required to adduce evidence sufficient to satisfy the standard of proof required to establish the guilt of the applicant at the trial.' All that is needed, in my view, is some evidence that supports a finding consistent with the operative words of sub-section (1) of s. 388 of the Criminal Code Procedure which are these: "… if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life … From that it appears to me to be reasonable grounds for believing that the applicant has been guilty of abetment in the commission of the offence of abduction. (emphasis added).

[33] Linton Albert J adopted that words of Augustine Paul J in *Dato' Balwant Singh (supra)* at p. 165, as follows:

> Accordingly, I advised the prosecution that something in the nature of an opening address may suffice. This must, of course, refer to the evidence to be adduced in support of the assertions made in the statement. This will be sufficient for the court to ascertain whether the prosecution will be able to produce *prima facie* evidence in support of the charge. **As the section speaks only of the existence of reasonable grounds and not evidence there is no requirement to analyze the evidence that is to be tendered.** The Court must apply its mind to the materials made available. This process will preclude a detailed examination of the evidence to avoid any form of prejudice to either party. (emphasis added).

[34] In *Madjai Sanusi v. PP* [2000] 5 CLJ 1 Abdul Malek Ishak J quoted Gunn Chit Tuan SCJ in *PP v. Zulkifflee Hassan* [1990] 2 CLJ 8; [1990] 1 CLJ (Rep) 249 as follows:

> For a start we considered that it should be borne in mind that s. 389 of the Criminal Procedure Code is concerned with the amount of bond executed by a person released on bail under Chapter XXXVIII of the said Code. That section specifies that when a man who is arrested is not accused of a nonbailable offence, no needless impediment should be placed in the way of his being admitted to bail. *The discretionary power of the court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. It is established that the courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and status of the accused*. In dealing with an application for bail it is also relevant that the court should consider what are the *penal consequences* of the act when proved, and what is the *nature of the offence charged,* and *whether the offence charged is or is not a bailable offence.* (emphasis added).

[35] The DPP submitted that bail can only be granted based on this court's discretion. By the fact that the sixth accused together with the other six accused had been charged it indicates that the prosecution had appropriately weighed the matter carefully and diligently regarding their involvement in the offence.

[36] As for the age of the sixth accused, it should not detract from the fact that in this case a young seven year old child is the victim and the impact and trauma caused should be considered.

[37] In view of the sixth accused's age, the risk is high that he would run away. The sixth accused is healthy, with no medical record of physical or health problems. The DPP posed the question on whether learned counsel is able to guarantee that the sixth accused would not do anything to threaten the victim or his family once he is released on bail.

[38] The DPP cited *Yusof Mohamed v. PP* [1995] 3 MLJ 66 where the judge at p. 69 stated:

> Bail in simple language, means security taken from a person to appear on a fixed date before a court. The meaning of the word 'bail' as ordinarily and commonly understood is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance. It is well and good that an accused person be put on bail pending the hearing of his appeal. *But under our CPC, bail is not to be granted automatically in almost every case. Society has to be protected from the hazards of the*

> *misadventures of one who has been alleged to have committed a crime. The Public Prosecutor approaches the criminal courts with a prayer to detain the criminal in an attempt to allay the fears of society.* As against this reasonable request of the Public Prosecutor as the guardian of society, there is the accepted principle of criminal jurisprudence that a man is presumed to be innocent until he is found to be guilty. It is, I think, in an attempt to resolve this conflict of principles that the law of bails has emerged. I must say that it is not a static law but is forever growing – moulding itself with the exigencies of time and place. (emphasis added).

[39] The DPP submitted that the sixth accused is not "sick" or "infirm" as provided in the proviso to s. 388 of the CPC, which the accused was in *Dato' Balwant Singh (supra)*.

Court's Decision

[40] After hearing the submissions of both parties I decided to adjourn the matter and at the same time directed the DPP to provide the court with some kind of information, in whatever appropriate form such as an opening address, as suggested by Augustine Paul J in *Dato' Balwant Singh (supra)*, or some other document, that can assist this Court to arrive at a correct decision under s. 388 of the CPC on the test, whether there appears to be reasonable grounds for believing that the accused has been guilty of the offence under the charge that is punishable with death or imprisonment.

[41] On 21 August 2009, the court resumed for continued hearing of the application. In the meantime, on 20 August 2009, the prosecution had filed an affidavit in support affirmed on 20 August 2009 ("the affidavit") by the Investigating Officer ("IO") of the case, Mohd Hazreeq b. Yunus. The DPP referred to the affidavit to support his contention that, based on the facts disclosed by the IO, there are reasonable grounds for believing that the seven accused are guilty of the offence under the charge.

[42] I perused the whole affidavit which disclosed in detail the specific role and involvement of each of the seven accused in the commission of the offence under s. 3 of the Kidnapping Act 1961. Based on the contents of the affidavit, I am convinced, at this stage, that there appears to be reasonable grounds to believe that each of the seven accused has been guilty of an offence punishable with death or imprisonment for life.

[43] Learned counsel for the second, third, fourth, fifth and seventh accused, and mentioning on behalf of learned counsel for the first accused and learned counsel for the sixth accused, submitted that the contents of the Affidavit regarding his clients are untrue eg, the third accused was never identified in the Identification Parade as stated by the IO, there is no proof that the RM1,000 found on the fourth accused is part of the ransom money, and the fourth accused is not the owner of the Proton Satria car that was used for the kidnapping as alleged by the IO.

[44] The DPP replied by submitting that the contents of the affidavit would be proven by evidence during the trial itself.

[45] I am of the opinion that the facts disclosed in the affidavit are merely information, and not evidence, to assist this court to decide whether to grant bail to the seven accused. The facts as disclosed, however, show in no uncertain terms the specific role and involvement of each of the seven accused in the commission of the offence. I bear in mind that what the IO had stated in the affidavit was given on oath and appropriate weight can be given to it at this stage. On the other hand, the dispute of learned counsel for the second, third, fourth, fifth and seventh accused regarding the truth of the contents of the affidavit was merely made by way of an unsworn statement from the Bar. Thus, such statement by learned counsel cannot be given any weight at all as compared to the affidavit.

[46] I consider the offence of abduction or wrongful confinement or wrongful restraint of a person for ransom under s. 3 of the Kidnapping Act 1961 to be a very serious offence. I also have to consider the possibility of intimidation or tampering of the prosecution witnesses should bail be allowed. After weighing the interest of the seven accused and the interest of the victim and his family, including society's interest as a whole, and the contents of the affidavit, I am of the opinion that it would not be appropriate or right to order the release of the seven accused on bail.

[47] Based on the above, and the authorities cited by both parties, I am satisfied that bail should not be allowed for this non-bailable offence under s. 388 of the CPC since there appears to be reasonable grounds for me to believe that each of the seven accused has been guilty of an offence punishable with death or imprisonment

for life. None of the seven accused are under the age of 16 years or is a woman or is a sick or infirm person to be able to qualify under the proviso to s. 388 of the CPC to be released on bail.

[48] Accordingly, I dismissed the application by the seven accused for bail. I further ordered the continued remand of each of the seven accused until the outcome of the trial.